IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30/04/2003

Coram

The Honourable Mr.Justice A.S.VENKATACHALAMOORTHY
and
The Honourable Mrs.Justice R.BANUMATHI

A.S.No.375 of 1989

K.Natarajan ... Appellant

-Vs-

P.K.Rajasekaran ... Respondent

This appeal is filed under Section 96 of Code of Civil Procedure against the decree and judgment of the learned Subordinate Judge, Karur in O.S.190 of 1986 dated 4.10.1988.

!For Appellant : Mr.S.Parthasarathy

^For Respondent : Mr.R.Gandhi, Sr.Counsel
for Mr.M.Kandasamy

:J U D G M E N T

A.S.VENKATACHALAMOORTHY, J.
The unsuccessful plaintiff in O.S.190 of 1986 on the file of Subordinate Court, Karur is the appellant herein.
2. The case of the plaintiff is that the defendant is his wife's cousin brother and that he used to visit plaintiff's father-in-law's place. On one such occasion, during the year 1981, the defendant approached the plaintiff for some loan as he desired to start a new business. According to the plaintiff, the defendant in fact asked the plaintiff to join the business, which he intended to start, at Palani. In or about July, 1981,

plaintiff expressed his willingness for starting carpet business at Palani. Thereafter on 19.8.1981, the defendant came to Karur and asked plaintiff to give Rs.25,000/- for purchasing materials for manufacturing carpets, namely, looms, yarn, etc. The further case of the plaintiff is that even though at that time he did not have the necessary funds, with a view to help the defendant, he (plaintiff) borrowed Rs.15,000/- from one Kandasamy and Rs.10,000/- from one Periasamy and paid the same to the defendant on 19.8.1981 at Karur. At the time of payment, one A.Chinnappa Gounder was also present. After receiving the money, defendant assured to the plaintiff that he will start the business within a month and inform the same to the plaintiff. On a further request made by the defendant, the plaintiff paid another sum of Rs.10,000/-, which amount was paid by the plaintiff by borrowing the same from one Subramani of Karur. Thus in all, defendant received Rs.35,000/- from the plaintiff viz., Rs.25,00 0/- on 19.8.1981 and Rs.10,000/- on 18.9.1981. The plaintiff, who happened to go to Palani after two months, came to know that the defendant has not taken any steps to start the business and when enquired the defendant, he only stated that he will start the business soon. Further case of the plaintiff is that even thereafter the defendant failed to start business, for which the defendant replied that he is not having funds and that he will return the a mounts received from Plaintiff for business, within six months. On 19.4.1982, the defendant wrote a letter evidencing the above payments. Several requests made by the plaintiff to the defendant to return the amount, failed to yield any result. Plaintiff in fact also preferred a complaint to Karur Police on 20.1.1983 that the defendant has cheated him. As in spite of repeated demands and requests the defendant has not paid the amount, the plaintiff filed the suit for recovery of money with interest at the rate of 18% per annum.

3. The defendant resisted the suit inter alia contending that he is an agriculturist, having enough lands to cultivate and that he never asked the plaintiff to help him to start business, as claimed by the plaintiff. The claim of the plaintiff that the amounts contributed to the defendant to start carpet business at Palani has been denied. According to the defendant, he was in need of money for agricultural operations and deepening well and only for that purpose he approached the plaintiff, whose family members are conducting Finance Corporations and in which plaintiff also has a share. The defendant admitted that the plaintiff obliged to him to the extent of Rs.35,000/- as debt for agricultural operations and the same is repayable with interest. The defendant admitted having written a letter to the plaintiff on 19.4.1982. According to the defendant, he paid a sum of Rs.4,700/- in the month of May, 1982 and balance of Rs.37,000/- in the first week of September, 1982 at Karur. As the defendant did not execute any document for borrowing, he did not insist for any voucher or receipt from the plaintiff while he repaid those amounts. According to the defendant, he having discharged the entire liability by making those payments, he is not liable to pay any amount and that the suit has been instituted only because of subsequent misunderstanding. A contention has also been raised by the defendant in the written statement that the suit is speculative and frivolous one. The plaintiff, having filed the suit by paying a Court fee of Re.1/- when he had sufficient funds at the time of presentation of plaint, the

presentation of plaint cannot be said to be proper one. The plaint, though was returned for compliance the same was re-presented after a period of one year 11 months and 28 days and for which the plaintiff has not given any explanation.

4. At the trial, both the parties let in oral and documentary evidence. The trial Court, after considering the materials available on record, came to the following conclusion,
(a) that the defendant borrowed a sum of Rs.35,000/- to meet his agricultural expenses;
(b) that the defendant had paid back the said amount with interest as agreed upon;
(c) that since the plaint was returned granting 15 days time by the Court to enable the plaintiff to affix necessary Court fee and the same was not having been represented within the time stipulated, the suit is liable to be dismissed as barred by limitation.

5. The learned counsel for the appellant contended that the plaintiff was not in a position to return the papers in time as they were produced before the criminal Court. As soon as those proceedings were over, that was in July, 1986, the plaint was represented affixing necessary Court fees. According to the learned counsel, the Court has got jurisdiction to extend the time to comply with the defects even after expiry of the time originally granted. Once the Court condones the delay in paying the deficit Court fee, it will not be open to the defendant to contend that the suit is barred by limitation; moreso, when he failed to raise this objection earlier and also subsequently in his written statement. As far as the plea of discharge is concerned, it is submitted that the defendant has not produced any evidence before Court to substantiate such plea and the trial Court has erred in coming to the conclusion that the defendant has discharged the liability.

6. The learned Senior Counsel appearing for the respondent would contend that when the Court granted time to the plaintiff to comply with the defect, namely to pay the deficit Court fee, no opportunity was given to the defendant to put forth his objections. The failure to pay the required court fee was wilful and only to harass the defendant. That apart, the affidavit in support of the petition to extend the time to pay Court fee contains totally false averments. Under Section 149 of Code of Civil Procedure, the Court while granting time, has to exercise its judicial discretion, but in this case that has not been done. That apart, it cannot be said that the term 'document' occurring in Section 149 would include plaint as well. The sum and substance of the written statement particularly paragraphs 6 and 7 is to the effect that presentation of the plaint cannot be taken as a ' proper presentation' as per the provisions of law. Even assuming that the defendant failed to raise a plea before the trial Court, certainly a plea of this nature can be made before this Court. On merits, the learned Senior Counsel contended that the trial Court is right in holding that the defendant

had paid back what all he borrowed along with interest.

7. Two questions arise for consideration in this case.
(1) Whether presentation of the plaint by the plaintiff can be said to be one of 'proper presentation' as contemplated under law and if the Court has not exercised judicial discretion under Section 149 C. P.C. correctly, at what stage the same has to be raised/questioned by the defendant ?
(2) Whether the finding of the trial Court that the defendant has proved his plea of discharge, is erroneous and calls for any interference ?

8. Order VI of Code of Civil Procedure deals with pleading in general, while Order VII deals particularly with reference to the plaint. The form for plaint is prescribed in Appendix-A and the same shall be used for all pleadings. Order VII Rule 1 is to the effect that the plaint shall contain certain particulars. Order VII Rule 1(i) reads,
"a statement of the value of the subject matter of the suit for the purpose of jurisdiction and of Court fee, so far as the case admits."
There is no provision in C.P.C. to the effect that a plaint cannot be presented without necessary court fee. But however, Section 4 of the Tamilnadu Court Fee and Suits Valuation Act, 1955 lays down that no document which is chargeable with fee under this Act shall be filed, exhibited or recorded in, or be acted on or furnished by, any court, unless in respect of such document there be paid a fee of an amount not less than that indicated as chargeable un der the Act. Hence, it necessarily follows that the plaint has to be valued under the Tamilnadu Court Fees and Suits Valuation Act and the same has to be presented after affixing the requisite court fee. But again, we have Section 149 of Code of Civil Procedure, which reads as under,
"Section 149. Power to make up deficiency of court-fees Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fee has not been paid, the Court, may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

Hence, the Court has got jurisdiction to allow a person, by whom the fee is payable to pay the whole or part, when it is found, he has not paid. In effect, Section 149 C.P.C. is proviso to Section 4 of Tamilnadu Court Fees and Suits Valuation Act, 1955. This has been pointed out by the Supreme Court in the case reported in AIR 1971 SC 137 4 (Mannan Lal v. Chhotka Bibi (died) by her LR and others). A plaint does not cease to be a plaint even if no court fee is paid at all since the words employed in Section 149 are, "to pay the whole or part, as the case may be". (Refer: AIR 1929 Privy Council 147 Faizullah v. Mauladad; AIR 1935 Patna 110 Jugal Kishore v. Bankey Behari Lal; AIR 1954 Nagpur 224 Baliram v. Champat Zamraji).

Further, there are no reasons for us to come to the conclusion that the term 'document' occurring in Section 149 would not include a plaint. (See: AIR 1951 Hyderabad 57 □ Muslim Bank v. Hasan Shiraza; AIR 1951 Allahabad 64 (FB) -S.Wajid Ali v. Mt.Isar Bano Urf Isar Fatma).

9. Section 149, which gives the discretion to the Court has to be exercised in a manner known to law. The discretion is one of judicial discretion. The BLACK's LAW DICTIONARY, Seventh Edition, by Bryan A.Garner would define "Judicial Discretion" as,

"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

The vesting of discretion is the unspoken, but inescapable, silent command of our judicial system and according to Lord Mansfield (Tingley v. Dolby, 14 NW 146),

"discretion, when applied to a Court of justice means sound discretion connected by law. It must be governed by rule, not by humour; it must not be arbitrary and vague, but legal and regular."

(a) In a ruling reported in reported in AIR 1978 SC 429 (G. Narasimhulu v. Public Prosecutor), the Supreme Court ruled,

"An appeal to a judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law."

(b) In AIR 1995 SC 1945 (Buta Singh v. Union of India), a case arising under Section 149 C.P.C., the Supreme Court while pointing out the scope of Section 149, ruled thus,

"Therefore, the Court is required to exercise its judicial discretion keeping the facts and circumstances in each case and not automatically for mere asking that indulgence be shown to the party to make good the deficit Court fee. In the latter event, it is not the exercise of the judicial discretion but showing undue indulgence."

Thus, the legal position is that the discretion available to the Court under Section 149 is one of judicial discretion to be exercised in a manner known to law.

(Also see: AIR 1951 Allahabad 64 (FB) □ S.Wajid Ali v. Mt.Isar Bano Urf Isar Fatma; AIR 1961 SC 882 □ Mahanth Ram Das v. Ganga Das)

10. The next question is what are the cases where the Court should exercise its discretion in favour of plaintiff/appellant, as the case may be.

Once the plaint is presented on the verge of limitation without requisite Court fee, time should not be granted blindly to rectify the defect, similarly should not be rejected mechanically for want of requisite Court fee. (Refer: AIR 1993 SC 1241 □ Mohammad Mahibulla v. Seth Chaman Lal).

Suppose if a bona fide mistake crepts in, say for instance, the plaintiff wrongly valued the suit under a particular provision or where something happened beyond his control, for example, robbery or nonavailability

of stamps, then the Court will be more in favour of granting time to the plaintiff to pay deficit Court fee. But at the same time, if the plaintiff so acted (a) to harass the defendant, (b) did it expecting a compromise or awaiting result of some litigation or (c) because of contumacy or mala fides on his part, Courts will not exercise its jurisdiction in his favour. By and large, the position is, the Court must be satisfied of bona fide mistake or some happenings beyond his control. In fact, in Buta Singh v. Union of India (referred supra), the Supreme Court has ruled as under,

"Mere poverty or ignorance or inability to pay the Court fee at the time of presenting the appeal is not always a good ground for indulgence under Section 149. Bona fide mistake on the part of the appellant or applicant in making the deficit court fee may be a ground to exercise discretion in favour of the appellant."

11. The next question is, once discretion is exercised in favour of the plaintiff and plaintiff also pays the deficit Court fee in time, whether it will have the effect as if necessary Court fee was paid even in the first instance. There can be no difficulty in answering in the affirmative since Section 149 itself makes it clear. For the purpose of completeness we point out that u nder the C.P.C. of 1882, there was a provision similar to Section 149, (i.e.,) Section 54(b).

Way back in 1909, a Full Bench of Madras High Court in ILR 1909 Madras 305 (FB)(Gavaranga Sahu v. Botokrishna Patro), as a reference by a learned single Judge, considered the following question,

"When a plaint is presented on a paper insufficiently stamped within the prescribed period of limitation, and time is given by the Court under Section 54(b) of C.P.C. to make good the deficiency, is the suit barred by limitation if the deficiency is supplied within the time fixed by the Court, but after the limitation period has expired."

and answered in the negative. (Also refer, AIR 1971 SC 1374 □ Mannan Lal v. Chhotka Bibi).

12. The next question that arises for consideration is, before the Court decides the discretion in favour of the plaintiff, whether notice need to be given to the opposite party. Of course, way back in the year 1953, the Supreme Court in AIR 1953 SC 431 (Mahasay Ganesh Prasad Ray and another v. Narendra Nath Sen and others) has ruled that question of payment of court fee is primarily a matter between the Government and the person concerned and the other party cannot attack the order on ground that it takes away his valuable right to plead the bar of limitation. But the fact remains, as pointed out in AIR 1995 SC 1945 (referred supra), the discretion to be exercised under Section 149 is one of judicial discretion and certainly it is open to the defendant to raise his finger if that is not exercised in a manner known to law, he being party to the proceeding. It is not as if here plaintiff sought permission to file the suit as a pauper and that is being opposed by the defendant.

(a) First we intend to refer to the decision reported in

1938(1) M.L.J. 514 (Sitharamayya v. Ramayya). In that case, an appeal was filed before High Court on 21st March, 1935 within the time allowed by law, but it was presented on a Court fee of Rs.5/-, while in the valuation memo attached to the memorandum, it was stated that Rs.224/- was the Court fee payable. Papers were returned for several times and on 15th July, 1935 appellant's counsel revised the valuation as Rs.111/-, but however, even that amount was not paid. Long thereafter, an application was filed for extension of time to pay the deficit Court fee. The case was then directed to be posted for arguments on the question whether in view of the fact that the deficit court fee was paid long after the expiry of the period of limitation, the appeal should not be dismissed as not presented in time. The Division Bench in that case ordered notice to the respondent and the matter was heard.
(b) In yet another ruling reported in AIR 1995 SC 1945 (referred supra), a matter arising under Land Acquisition Act, the appellant initially filed an appeal claiming certain amount and paid Court fee thereon and finding that the Court is inclined to award more than what is claimed, sought permission to pay the deficit court fee. That was allowed by the High Court. The Supreme Court pointed out that the aid of Section 149 could be taken only when the party was not able to pay Court fee in circumstances beyond his control or under unavoidable circumstances and the Court would be justified in and appropriate case to exercise the discretionary power under S.149 after giving due notice to the affected party.

13. Thus, the legal position can be summed up as that before exercising discretion under Section 149 C.P.C., and granting time to the plaintiff to pay necessary Court fee and which time goes beyond the period of limitation to file a suit, notice must be given to the defendant. We also point out that suppose a reason is given by the plaintiff for not paying the Court fee, it would not be possible for the Court to investigate into it and certainly the presence of the defendant will help the Court to take a decision.

14. Of course, where the time granted by the Court to pay the deficit court fee falls within the period of limitation to file the suit, no notice need be given to the defendant/opposite party. It is desirable that whenever a plaint is presented, the same is verified and returned at least on the third day (excluding the holidays), if necessary pointing out the defects.

15. The next question is, suppose if no notice is given to the defendant and the Court exercises its discretion in favour of plaintiff, what is the remedy to the defendant. The defendant can file an application under Section 151 C.P.C. with necessary prayer thereon. Once such an application is filed, the Court will take the same on file if in order and dispose of within a period of three months therefrom after hearing both the parties, in any event before framing of the issues. The rulings AIR 1950 Madras 769 (Venkataseshamma v. Ranganaryakamma), AIR 1967 A.P. 147 can be pointed out in support of this legal position. Of course, the defendant alternatively will be at liberty to file a revision under Article 227 of

Constitution of India. Whenever a plaint is filed affixing less Court fee than what is required under the Act, the plaintiff is bound to file an affidavit setting out the reason as to why he or she is paying less Court fee than the one mentioned in the plaint itself. Thereupon, the Court before granting time, order notice to the defendant, hear him/her and decide as to whether time should be granted or not. But however, in respect of cases where the time has already been granted, if defendant has grievance that Court should not have granted time, it will be open to the defendant to take out an application as mentioned supra.

16. The next question is, will it be open to the defendant to raise objections for the first time at the trial of the suit or at the appellate stage. We have to answer only in the affirmative. We have already seen by referring to various rulings of the Supreme Court as to what is meant by judicial discretion. Hence, it is unnecessary to refer to the same over again here. Failure to exercise judicial discretion on the principles laid down by the Supreme Court is nothing but failure on the part of the Court concerned to apply the correct provision of law in a given case.

17. The next question is, suppose if the plaintiff fails to deposit the deficit Court fee within the time granted and also fails to make any application for extension of time before expiry of that time granted at the first instance, can he thereafter file a petition for extension of time. Nothing in Code of Civil Procedure which would restrict the powers of the Court. The Court can in extreme and exceptional cases when satisfied, can extend the time. (Please refer: AIR 1961 SC 882 - Mahanth Ram Das v. Ganga Das).

18. Once deficit Court fee is not paid within the time granted or when the extension of time was sought for is not granted, the plaint has to be dismi9ssed as not one of proper presentation (Please see: 19 38(1) M.L.J. 514 □ referred supra).

19. Keeping in mind the above legal position, let us proceed to consider the case on hand. According to the plaintiff, he gave Rs.25,0 00/- on 19.8.1981 and another Rs.10,000/- on 18.9.1981 to the defendant. He filed the suit on 17.8.1984, just one day before the last date of limitation. In the plaint, under the heading "Details of Valuation", he has clearly stated that the Court fee payable is Rs.4,030.75 . But however, he has affixed court fee of only Re.1/-. The plaint was returned on 21.8.1984 giving two weeks time to rectify the defects which would include paying of deficit Court fee. Along with the plaint, plaintiff filed only a xerox copy of the letter dated 19.4.1982 , written by the defendant to the plaintiff. Admittedly, he did not re-present the plaint with requisite Court fee within the time granted. Only long thereafter i.e, on 2.9.1986 it was re-presented with requisite Court fee. Along with the same, plaintiff also filed an affidavit explaining the reasons for delay in representing it. In the affidavit he has stated as under,

"03. I have also filed a criminal complaint in C.C.No.576 of 1984 in Crime No.786 of 1983 under Sec.420 I.P.C. against the respondentdefendant. I have produced the original voucher in the said proceedings and the trial has ended in July, 1986 only. So I could not represent the plaint as the records were handed over to the Public Prosecutor and the crime Police, Karur.
04. Only now I am able to get back the records after the completion of the trial and re-presenting the suit.
05. So I could not re-present the plaint with necessary court fees."
Apart from that, plaintiff also filed another petition to dispense with the notice to respondent. The learned Judge returned the petition, wherein the plaintiff sought for dispense with notice to the defendant, as unnecessary. In the other petition (i.e.,) to excuse the delay in paying deficit court fee, the learned Judge passed the order in two words as 'delay excused'. On the face of it, it is clear that the learned Judge has not exercised his discretion, but passed the order for mere asking. It is unfortunate the learned Judge has not even looked into the affidavit filed in support of the petition to condone the delay in paying deficit court fee. In the said affidavit, the plaintiff has stated that he has produced the original vouchers in the criminal proceedings and hence the delay occurred. we have already pointed out, along with the plaint the plaintiff produced only xerox copy of the voucher. Certainly he would have handed over the plaint or xerox copy of the letter dated 19.4.1982 in the criminal Court. That being so, nothing prevented the plaintiff to re-present the plaint within the time allowed. Also to be noted is, the plaintiff has been a Financier and it is not his case that at any point of time he was in need of money. It is crystal clear from the facts and circumstances that plaintiff thought by harassing the defendant by resorting to criminal proceeding, he can extract the money that he desired and in the meantime he never wanted to spend the amount by paying Court fee. Thus, there is utter lack of bona fides on the part of the plaintiff. He seems to have taken the Court just for a ride and it can be well said that he abused the process of law. We are also shocked to find that the police authorities have registered a case against the defendant under Section 420 I.P.C. and he had to undergo an ordeal of full-fledged trial. The learned Judicial Magistrate rightly acquitted the defendant in that case. In the above circumstances, we hold that the trial Court ought not to have taken the case on file on the ground that there was no proper presentation of plaint by the plaintiff.

20. Coming to the merits of the case, admittedly both the plaintiff and the defendant are close relatives. The defendant borrowed the amount for his agricultural expenses. It is equally admitted that the plaintiff did not obtain any letter or pro-note while advancing the money. The claim of the defendant is that he has paid back the amounts due in two installments and he also did not take any receipt or acknowledgment in this regard. We have only the testimony of plaintiff and defendant. We have carefully perused the evidence of these witnesses and we are only inclined to agree with the learned Subordinate Judge in coming to the conclusion that only the testimony of DW-1 infuses confidence. We have already pointed out that PW-1 seems to be a liar. As rightly pointed out by the lower Court, the parties were cordial during 1982 and the relationship became strained only in

the year 1983, which prompted the plaintiff to come forward with the suit. On the other reasonings given by the lower Court viz., that the plaintiff being a Financier should have complete account and the failure to produce the same would go a long way against him, we do not find any reason to take a different view. For all the above reasons, the appeal is liable to be dismissed.

21. We deem it necessary to clarify the legal position and lay down the procedure to be followed as under:
(1) Section 149 of Code of Civil Procedure is a proviso to Section 4 of the Tamilnadu Court Fees and Suits Valuation Act, 1955.
(2) The word 'document' employed in Section 149 of Code of Civil Procedure would include plaint also.
(3) Whenever a plaint is received, the same shall be verified and if found to be not in order, the same shall be returned at least on the third day (excluding the date of presentation so also the intervening holidays).
(4) If the suit is presented on the last date of limitation affixing less Court fee, than the one mentioned in the details of valuation in the plaint, an affidavit shall be filed by the plaintiff giving reasons for not paying the requisite Court fee.

(5) In such cases, the Court shall before exercising its discretion and granting time to pay the deficit Court fee, shall order notice to the defendants and consider their objections, if any. However, such notice is not necessary in cases where the plaintiff has paid almost the entirety of the requisite court fee and the Court is satisfied on affidavit by the party that the mistake happened due to some bona fide reasons such as calculation mistake or the alike.

(6) The discretion referred to in Section 149 of Code of Civil Procedure is a judicial discretion and the same has to be exercised in accordance with the well established principles of law.
(7) But however, in cases where the time granted to pay the deficit Court fee falls within the period of limitation, the defendant need not be heard.
(7A) In case where the plaint is presented well within the period of limitation with deficit court fee and the court returns the plaint to rectify the defect giving some time (2 or 3 weeks), which also falls within the period of limitation, but the plaint is re-presented paying deficit court fee after the period of limitation, the Court is bound to hear the defendant, notwithstanding the fact that the plaintiff has paid substantial court fee (not almost entirety) at the first instance, before condoning the delay in paying the deficit court fee.
(8) In cases where part of the time granted to pay the deficit Court fee falls outside the period of limitation and the deficit court fee is paid within the time of limitation (i.e., the plaint is represented with requisite court fee), the court need not wait for the objections of the defendant and the plaint can be straight away numbered.
(9) The court should exercise its judicial discretion while

considering as to whether time should be granted or not. Cases where the plaintiff wrongly (bona fide mistake) valued under particular provisions of law under Court Fee Act or where he could not pay the required Court fee for the reasons beyond his control, due to some bona fide reasons, the Court shall condone the delay. Payment of substantial court fee is a circumstance, which will go in favour of the claim of the plaintiff that a bona fide mistake has crept in.
But however, in cases where the plaintiff acted wilfully to harass the defendant (like wilful negligence in paying court fee, awaiting the result of some other litigation, expecting compromise, etc.).
(10) If the court had exercised its discretion without issuing notice, then it is open to the defendant to file application under Section 151 of Code of Civil Procedure for proper relief. It will be open to the defendant to file a revision under Article 227 of Constitution of India. That apart, objection can also be raised at the trial or even at the appellate stage, since the failure to exercise judicial discretion in a manner known to law (as laid down in various decisions of the Supreme Court) amounts to Court applying a wrong provision of law.

22. In the result, the above appeal is dismissed. The decree and judgment of the learned Subordinate Judge, Karur in O.S.190 of 1986 dated 4.10.1988 are hereby confirmed. We are of the firm view that this is the fit case where the appellant/plaintiff should be called upon to pay a cost of Rs.5,000/- to the respondent/defendant and accordingly we do so.

vr

To

1.The Subordinate Judge, Karur.

2.The Section Officer, V.R.Section, High Court, Madras.